Now *Odgers* on Pleading and Practice says "The plaintiff must also make on the writ before it is issued an indorsement of claim — that is a statement as to the nature of his claim and the relief or remedy which he seeks —" but the rule says "or" not "and". It is in my opinion enough in a generally indorsed writ to state either the nature of the claim or the relief or remedy required.

Order 3 rule 1 reads:—

"The indorsement of claim shall be made on every writ of summons before it is issued and shall be signed by the plaintiff or his solicitor.".

Where as here, the intention is to set out the relief or remedy required, it is not necessary to state the precise relief or remedy required, but it must be shown what class of relief or remedy is sought. The indorsement must be sufficiently definite for the defendant to know why he is being sued: that, in my judgment, is basic principle. If a defendant does not know he is being sued, how can he decide how best he should react to the service of the writ on him? I do not see how, from the indorsement of claim in this case, the defendants can know why they are being sued. There is nothing at all to show why the sale of the land in Sibu O.T. 16872 is being asked for, or in what way the plaintiffs consider themselves entitled to an order for its sale; there is nothing to show what sort of an action this is. It is my opinion and decision that the indorsement on the writ of summons in this case is irregular, does not comply with rule 1 of Order 2 of the Rules of the Supreme Court, 1957, in that it does not properly or sufficiently state the relief or remedy required.

It remains to decide whether or not I should, in exercise of my discretion, set aside the writ. In the case already quoted, of *Hill* v. *Luton Corporation,*[6] Devlin J. (as he then was) said in the course of his lucid and illuminating judgment — "To set aside a writ for defective indorsement is a very strong thing to do. I have not been referred to any case where it has been done, even where the defect remained uncured, except *Huntly* (*Marchioness*) v. *Gaskell,*[7] where the court regarded the indorsement as tantamount to an abuse of process." I do not consider this a matter for strong action, but something must be done, as the writ as it stands is not good enough. I accordingly choose the milder course of setting aside the service of the writ on each of the three defendants — as was done (according to the judgment in *Hill* v. *Luton Corporation*) in the case of *Truslove* v. *Whitechurch,*[8] no report of which is available here — and I order accordingly.

Service of writ set aside.

PUBLIC PROSECUTOR v. LO AH ENG

[O.Cr.J. (McGilligan J.) April 24, 1964]

[Kuching — Criminal Case No. K 17 of 1964]

Evidence — Adverse witness — Right to cross-examine — Evidence Ordinance (Sarawak Cap. 54), s. 157 — Preservation of Public Security Regulations, 1963,

In this case the accused was charged with consorting with persons carrying firearms and explosives in circumstances which raised a reasonable presumption that they intended to act in a manner prejudicial to public security. Two of the witness called by the prosecution were ruled by the court to be adverse and hostile to the prosecution. They were allowed to be cross-examined by the Deputy Public Prosecutor and they admitted making statements to the police and that what they said in the statements were true.

Held: there is no provision in the Evidence Ordinance of Sarawak giving a right to cross-examine a hostile witness and therefore the statements made by the witnesses, which were elicited in cross-examination, were inadmissible and could not be used as evidence against the accused.

[**Editorial Note:** There is no section in the (Malayan) Evidence Ordinances corresponding to section 157 of the (Sarawak) Evidence Ordinance.]

Case referred to:—

(1) *R.* v. *Golder* [1960] 1 W.L.R. 1169.

CRIMINAL TRIAL.

D. M. Goodbody (Deputy Public Prosecutor) for the Public Prosecutor.

Accused in person.

McGilligan J: The accused stands charged as follows.

"That you on or about the 24th day of October 1963, at Selapong Lup on the Serian Simanggang Road did consort with Pak Sa-San, Chai Siew Min and other persons unknown who were carrying firearms and explosives in circumstances which raised a reasonable presumption that you intended to act with such person in a manner prejudicial to public security and thereby committed an offence punishable under the provisions of regulation 4(1) of the Preservation of Public Security Regulations, 1963".

The prosecution called nine witnesses. Two of these — the main one, Chai Siew Min, and a strong supporting witness (if his evidence is admissible and is believed) Ng Ah Siong — were ruled by the court to be adverse, hostile to the prosecution.

The evidence of the witnesses, other than the two ruled adverse, showed *prima facie* that there was on the 24th of October 1963 an engagement between the security forces and an invading band from Indonesia at a place called Selapong Lup, which is about 3 miles from Goa, which in turn is on the 100th Mile Simanggang Road; that early on the morning of the 25th of October about 8 a.m. the accused was seen to emerge from the jungle near the Goa bus stop on the Simanggang Road by two Ibans who were resting at that bus stop; that he was wearing only shorts, which were wet through, that he had no shoes on and

that his body was all covered with scratches; that the two Ibans, not satisfied with what he said to them, detained him until a vehicle with some Gurkhas in it came along, and he was taken away by them to Simanggang Police Station; that there he was pointed out to an assistant superintendent of police by another man, Chai Siew Min, whom the assistant superintendent of police described as a "captured terrorist" (though he neither gave reasons for so describing him nor said when he was captured).

There was also the evidence of Lai Swee Chin or Ajap, and Lo Gek Kee. Ajap said he was the uncle of the accused, that he (Ajap) lived at 81st Mile Simanggang Road, that he had seen accused only occasionally at 29th Mile — nowhere else — and that he had never given the accused a lift in his car. Lo Gek Kee said that the accused was her brother, and that the accused left the 29th Mile area, where the family garden and another garden worked by the accused were, in September last year, to look for work, and that she had not seen him since until a few days before the trial.

Ng Ah Siong, before he was treated as adverse, stated that he lived at Goa and met Ungki and Kumpang, the two Iban witnesses before referred to, at the Goa bus stop early one morning in October last year. He then went on to say that he had spoken to no-one but the two Ibans that morning, and that he had never seen the accused before. He was then asked by the learned Deputy Public Prosecutor if he had made a statement to the police. He said "Yes", and the statement was read to him. The court then ruled that he was an adverse witness. In this I confess the court failed to follow the proper procedure, as laid down in section 157 of the Evidence Ordinance. Section 157 reads as follows:—

"A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall in the opinion of the court prove adverse, contradict him by other evidence, or, by leave of the court, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he has made such statement."

Clearly the ruling that a witness is adverse should come before the witness is referred to his previous statement. However in my opinion it would have been perfectly correct (and indeed proper) for the court to have been shown the statement before so ruling (though English decisions differ on this somewhat); however, the witness had already seemed reluctant and unwilling and the court would certainly have taken the same course if the proper procedure had been followed.

Ng Ah Siong then under cross-examination by the learned Deputy Public Prosecutor admitted to making the statement and said that it was all true, that he had misunderstood the questions put to him earlier and that there had indeed been a Chinese at the Goa bus stop as well as the Ibans. He still said, however, that he did not see that Chinese in court. His statement was to the effect that in October 1963 he met a Chinese youth with two Ibans in a hut on the Simanggang Road and had a conversation with him; in it the Chinese said that a man called Ajap brought him to Goa in a motor vehicle to collect wood and work in his padi field; but he did not answer questions as to where the padi field was, or where his working tools were. Ng also said that he formed the opinion the accused was frightened and was lying.

The statement of Ng Ah Siong was then duly proved by the police inspector who took it.

Chai Siew Min at first refused to give evidence at all, even to be affirmed, and it was only after some time and warnings from the court that he was affirmed and started to give evidence. From the first he seemed most adversely inclined to the party calling him.

He began his evidence by saying that he was at present serving a sentence for consorting, and next said that he had never seen the accused before. He was then asked about a statement to the police, admitted making one and was ruled adverse. Once again the procedure was wrong, though not so much so as on the previous occasion; and there was no doubt at all that this witness was hostile from before giving, and from the beginning of, his evidence. Having been ruled adverse he left the box and his statement was duly proved by the same police inspector. He then returned to the box and the whole of the proved statement was read to him, and put to him in cross-examination by the learned Deputy Public Prosecutor. He said it was all true, but (in effect) that the Lo Eng referred to in it was not the person in the dock.

His statement was to the effect that he knew Lo Eng and that they had first met on the third of June 1963 at Keragan on the Simanggang Road; that the two of them and others left for Indonesia on the third of June; that after some military training there he, Lo Eng and others in October 1963 crossed the Sarawak border led by an Indonesian, Pak Sa-San; that he had 2 hand-grenades, but did not know whether or not Lo Eng was armed.

The question is whether what is written on the statements made to the police by Ng Ah Siong and Chai Siew Min may be treated as evidence in this court; that is, whether the court can take them into account in deciding on the accused's guilt or innocence.

At the end of the prosecution case I ruled that what was said in the statements could be evidence in this court, and that there therefore was evidence which, if believed, would warrant the accused's conviction. Having now come to the stage of judgment I find it necessary to consider this question again: Can what is written on the papers containing the statements by Ng Ah Siong and Chai Siew Min be treated as evidence?

Before answering the question I may say that I entirely agree with what has been very fairly said by the learned Deputy Public Prosecutor, that if the words in these statements have no evidentiary value there is nothing but strong suspicion against the accused. On the other hand if those words are admissible in evidence and are believed there is a very formidable case against the accused. It is Chai Siew Min who is the vital witness; Ng is only a supporting witness and, even if his evidence is disregarded, Chai's — if admissible and believed — could be sufficient to convict the accused, that is when taken with the other supporting evidence.

I now return to section 157 of the Evidence Ordinance. Under that section it is clear that previous statements may only be proved to impeach the credit of the adverse witness; the initial words govern the whole section. The statements themselves when proved are not substantive evidence.

There is a long line of English cases, of which the latest — as far as I know — is *R.* v. *Golder* [1] laying down that when a witness is treated as hostile and is then shown to have made a previous statement contradictory of (or inconsistent with) the evidence given by that witness at the trial, not merely should the evidence at the trial be regarded as unreliable, but the previous statement does not constitute evidence on which the trial court can act.

In all these cases, however, the witness in the trial court, even if he admitted making the previous statement, said that what was in it was untrue. These statements were inadmissible as evidence, even when proved, in my opinion, because there was nothing to make them admissible. They were proved merely, under a special provision (identical with our section 157) of the law of England, to impeach credit. None of them could have been put in as evidence, if for instance, the witness concerned had not been called. They were allowed to be proved for the one purpose only, of impeaching credit.

Here, however, we have the novel situation that each witness, having been ruled adverse, stated that his previous statement was true, though continuing to deny that he knew the accused. In Chai Siew Min's case there was in fact nothing literally contradictory of what he had said to the court in his previous statement, and he was ruled adverse only because of his demeanour and before the court knew what was in his statement. In these circumstances does the fact that under cross-examination by the party calling him, the prosecutor, he admitted as true everything said in the statement make the words of that statement admissible as evidence in this trial, make the words which are recorded on the written statement part of Chai Min's testimony to this court, and so make those words (not the statement itself) admissible as substantive evidence?

In my opinion the answer to that question, provided there is a right or power to cross-examine an adverse witness by the party calling him, is Yes. I have previously taken it for granted that there is in this country such power (as there is under English law) and accordingly allowed the cross-examination of the adverse witness by the prosecutor. But I have now come to the conclusion that there is no such power to cross-examine an adverse witness under Sarawak law. The courts are bound by the Evidence Ordinance, which is a comprehensive code of the law relating to evidence in Sarawak. The common law does not therefore apply and it cannot be said that the common law gives a right to the calling party (it is from the common law the right comes in England) to cross-examine a hostile witness. That power or right, if it exists, must come from the Evidence Ordinance. I cannot find that it is anywhere given by that Ordinance. There is in the Indian Evidence Act a section, section 154 which reads:—

> "The court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party."

There is no similar section here.

The only section dealing with adverse witnesses is section 157, and nothing in it can be said to allow any cross-examination, or indeed any questions other than such question as are necessary to describe the circumstances in which the alleged previous statement was made, and the question whether or not the witness made such a previous statement.

It is my judgment therefore that, as there is no right or power in the party calling him to cross-examine an adverse witness and as the prosecutor therefore had no right to cross-examine Chai Siew Min and Ng Ah Siong, and as what they said in reply to this cross-examination is therefore not admissible as evidence and must be disregarded by the court, there is no way in which the words recorded on the written statements as of Chai Siew Min and of Ng Ah Siong can be made part of the substantive evidence (for or against the accused) in this trial.

It follows from what I have said before that there is on the evidence accepted by the court, no more than strong suspicion against the accused. The case against him has not been proved and he is acquitted on the charge against him.

Accused acquitted.

RATNA AMMAL & ANOR. v. TAN CHOW SOO

[F.C. (Thomson L.P., Wylie C.J. (Borneo) and Tan Ah Tah F.J.) April 28, 1964]

[Penang — Federal Court Civil Appeal No. 96 of 1963]

Partnership — Whether agreement constitutes a partnership — Partnership property — Whether property rights in trade mark vested in partnership or in partner alone — Partnership Act, 1890 ss. 20 and 21.

Trade Marks — Property in — Partnership — Trade Marks Ordinance, 1950, ss. 38, 52 and 54.

The parties in this case had entered into an agreement to form a so-called syndicate for the purpose of selling condensed milk, the relationship thus constituted being essentially a partnership. The respondent had obtained registration of a trade mark in respect of milk and other dairy products. The question was whether the property rights in the trade mark were vested in the partnership or were to remain vested in the respondent alone.

Held: it was clear from the terms of the written agreement between the parties that the property rights in the trade mark were to be remain vested in the respondent.

Decision of Hepworth J., *ante* p. 24, affirmed.

Cases referred to:—

(1) *Adam* v. *Newbigging* (1888) 13 App. Cas. 308 at page 315.

(2) *Weiner* v. *Harris* [1910] 1 K.B. 285 at p. 290.

FEDERAL COURT.

V. K. Palasuntharam for the appellants.

C. O. Lim for the respondent.

Cur. Adv. Vult.

Thomson L.P.: I have had the advantage of reading Sir Campbell Wylie's judgment with which I agree.

The object of the agreement between the parties dated 3rd November, 1961, was to form a so-called syndicate for the purpose of selling condensed milk. The relationship thus constituted between them was no doubt essentially one of partnership. It is, however, well-settled law that persons may be partners in some particular business although all or part of the property used for the purpose of such business may not be the subject of joint-ownership but may belong to some or one of them individually.

The question of whether any particular property is or has become the subject of joint-ownership is a question which has to be decided in each individual case. In the present case I think it is clear from the terms of the written agreement that the property rights in the trade mark *tanta et talia* were to remain vested in the respondent.

Wylie C.J. (Borneo): The appellants proceeded by originating motion in the High Court at Penang for an order under section 46 of the Trade Marks Ordinance, 1950, to have the register of trade marks rectified in one of several different ways in respect of trade mark No. M/36213. At the hearing of the appeal, it became clear that the order which the appellants really sought was an order that both the appellants and the respondent should be entered on the register as the registered proprietors of the trade mark instead of the respondent alone, as is the present position. Having regard to the evidence (which is to the effect that the respondent first acquired the right to use this trade mark, applied for registration and then, before registration was effected, formed with the respondents a syndicate which was to use this trade mark for a certain class of business only) it may be doubtful whether an order to this effect could be made under an application under section 46. See *Kerly* on Trade Marks (eighth edition) at page 202 paragraph (10) and the cases cited in the seventh edition referred to in the footnote. However, the appellants did ask, in the alternative, for an order expunging the registration entirely, and, in the view that I take of the appellants' claim, the point becomes immaterial. The respondent has not raised it and both parties obviously wish the court to determine their differences concerning this trade mark in these proceedings.

Affidavits were sworn by the appellants and the respondent. None of the deponents were cross-examined and the only evidence is that contained in these affidavits, together with certain documentary exhibits. This court was informed that the Registrar has had notice of the proceedings, but has not appeared. The High Court refused to make any order for rectification and the appellants have appealed from that decision.

There is little dispute as to the facts. These disclose that the respondent has since September 1959 been importing and selling sweetened condensed milk (referred to as Saint Brand milk) in tins bearing the trade mark ultimately registered as No. M/36213. On 28th August, 1961, the respondent made formal application for registration of the trade mark in respect of milk and other dairy products. The trade mark was registered on 1st October, 1962, but with effect from the date of the application (28th August, 1961) in accordance with section 29 of the Trade Marks Ordinance, 1950. The registered proprietor is described in the certificate as "Tan Chow Soo trading as Soo Seng."